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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 237.

A. BRIGHAM ROSE and ZELLETTA ROSE; LORI, LTD., INCORPORATED; ZELLETTA M. ROSE and A. BRIGHAM ROSE,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

Petitioners, as a basis for this Petition for Rehearing, submit that respondent, in his brief before this Court, has admitted error with respect to a factor which exceeds in amount the entire sum in dispute. Petitioners further submit that by reason of this, the decision of the Court of Appeals herein is in conflict with long-settled decisions of this Court.

I.

Respondent, in his brief in opposition to the petition for certiorari herein, has taken the position that certain financial statements which they themselves introduced are irrelevant. (Br. p. 11.) The only serious basis given for this position is that the statements "were all dated in mid-

year," while the petitioner's tax returns were filed on a calendar year basis. (Br. p. 11.) Respondent does not defend the Tax Court's inclusion of accounts receivable in the net worth and income figures found as derived from these financial statements.

Contrary to the respondent's position before this Court, however, the Tax Court relied squarely upon these financial statements in its decision below, and the context of its use can leave no doubt that they exercised a strong influence upon the findings of that court. The court stated:

> "With reference to the individual petitioners, there should further be observed a substantial increase in their net worth, during the period involved, as reflected in the statements of financial condition prepared by petitioner. The falsification of such statements is a crime under California law. California Penal Code, Section 532a." [R. 450-451.]

Thus, the language of the decision below in the Tax Court clearly indicates its use of these financial statements, not only as a basis for a deficiency finding, but even more important, as a basis for a finding of fraud. Indeed, the Tax Court is careful to note that its finding of fraud was based "upon the record *as a whole.*" [Br. 8; R. 452.] (Italics added.)

These statements, therefore, played a vital role in the findings of the Tax Court; yet the increase in the accounts receivable contained in the statements and which the Tax Court erroneously failed to remove, some $44,000,

exceeded *the entire amount of income in dispute.* Clearly, then, the error was reversible:

> "An erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial." (*McCandless v. United States,* 298 U. S. 342, 347.) (Italics in original text.)

The Court of Appeals did not say, nor does respondent's brief contain any contention, that it affirmatively appears from the whole record that the Tax Court's error was not prejudicial. Nor could it make such a contention here, where the Tax Court not only determined that there was additional income, but found petitioners guilty of fraud; for on that issue, as the Tax Court itself conceded, the burden of proof is on the government, and the evidence "must be clear and convincing." [R. 451.]

II.

The error which the Tax Court made in respect to the financial statements is easy to correct. It is a matter of simple arithmetic to convert financial statements prepared on an accrual basis to a cash basis by eliminating the accruals, here the accounts receivable. It is likewise simple, in the case of an operating business, to convert financial statements dated in midyear to a calendar-year basis by the common process of interpolation. That is what the Tax Court must have done here when, as the quotation above from its opinion shows, it treated the financial statements as showing the increase in petitioners' net worth

"during the period involved." The only error it made in respect to these statements was that it failed to eliminate the accounts receivable. That error, it appears clear, the respondent has conceded.

Petitioners do not seek a new trial. Nor do they seek a simple reversal. All they seek is a remand of the cause to the Tax Court for reconsideration of the record after eliminating the accounts receivable, and any other accruals, from the figures shown in the findings as derived from petitioners' financial statements.

Conclusion.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

GEORGE T. ALTMAN,

Counsel for Petitioners.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

GEORGE T. ALTMAN,
Counsel for Petitioners.